Supreme Court, U.S.
FILED
OCT 24 1990
SPANIOL, JR.
CLERK

No. 89-1541

In the Supreme Court of the United States

OCTOBER TERM, 1990

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
AND
CF&I STEEL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In our opening brief, we showed that, under the regime created by the Occupational Safety and Health Act (OSH Act), the Secretary of Labor, rather than the Occupational Safety and Health Review Commission, is entitled to deference in the interpretation of the Secretary's regulations. As we discussed (at 18-27), deference is rooted in respect for the congressional delegation of policymaking authority; the OSH Act assigns policymaking and enforcement responsibilities to the Secretary, and establishes the Commission as a "neutral arbiter." *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. 3, 7 (1985). The appropriate question for a reviewing court should thus be the reasonableness of the Secretary's interpretation of her regulation. Because the court of appeals erroneously de-

ferred to the Commission and did not determine the reasonableness of the Secretary's interpretation of her regulation, we believe the judgment should be reversed and the case may appropriately be remanded to the court of appeals for that determination.

In response to our argument, respondent and its amici, including the Commission, offer a range of objections and maintain that deference should properly be accorded to the interpretation of the Commission. We will consider the various objections in turn.

1. At the outset, it is important to address certain claims concerning our position and corresponding principles of administrative law.

a. Respondent fundamentally mischaracterizes our position as arguing that "a reviewing court should always defer to the interpretation of the Secretary, regardless of whether that interpretation is reasonable." Resp. Br. 19-20 n.18. In fact, our opening brief is quite explicit that the Secretary's interpretation should be upheld *if it is reasonable*, and that the reasonableness of the Secretary's interpretation is the appropriate question for a reviewing court.[1]

b. The Commission, for its part, also fails to present an accurate characterization of our position. The Commission repeatedly asserts that we would require the Secretary's interpretation to be given "controlling weight" (see, *e.g.*, Comm'n Amicus Br. 10, 18), but never places that term in the context in which it was used. We employed the phrase in quoting the settled principle of deference accorded an agency's interpretation of its own regulation: such an interpretation is " 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " Gov't Br. 20-21 n.17 (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). This principle has been consistently reiterated by this Court.[2]

[1] See, *e.g.*, Gov't Br. 16 ("[A] necessary component of [the Secretary's] rulemaking authority is the ability to issue *reasonable* interpretations of those standards for the guidance of employers and employees.") (emphasis added); *id.* at 24 n.22 ("In this context, * * * the appropriate question for a reviewing court should be the *reasonableness* of the Secretary's interpretation.") (emphasis added). See also *id.* at 15, 20 n.17, 22, 27, 37 & n.37.

c. Rather than addressing the decisions concerning an agency's interpretation of its regulations, the Commission launches into a confused discussion of deference principles and administrative law. Amicus Br. 10-15. The Commission's central point seems to be that "*Chevron*-style deference" is appropriate principally for rules and orders, while a lesser form of deference, pursuant to *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), is appropriate for most other forms of administrative interpretations. Br. 13, 15.[3] But the sharp line the Commission seeks to draw between *Chevron* deference and *Skidmore* deference is untenable. In *Chevron* itself, the Court relied on *Skidmore* in determining the reasonableness of the agency's interpretation; *Skidmore* was thus an aspect of the Court's application of "*Chevron*-style" deference. See *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 865 & n.40 (1984). Other decisions have also relied on *Skidmore* in evaluating regulations. See, *e.g.*, *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11 (1980). Conversely, and contrary to the Commission's suggestion, *Chevron* has been applied to administrative

[2] See Br. 20-21 n.17 (citing *Robertson* v. *Methow Valley Citizens Council*, 109 S. Ct. 1835, 1850 (1989) and *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965)). See also *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977); *Thorpe* v. *Housing Auth.*, 393 U.S. 268, 276 (1969).

[3] In *Skidmore*, this Court held that the "rulings, interpretations and opinions of the Administrator" of the Wage and Hour Division of the Department of Labor under the Fair Labor Standards Act, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140.

interpretations not embodied in regulations or orders.[4] Moreover, the Commission's analysis ignores the settled principle of deference to an agency's interpretation of its own regulation, whether or not embodied in a regulation or order. See, *e.g.*, *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986); *Thorpe* v. *Housing Auth.*, 393 U.S. at 276; *Bowles*, 325 U.S. at 416.

We believe that *Chevron* is not confined to one side of a rigid dichotomy but stands for a broad principle of deference to reasonable administrative interpretations; that this principle fairly embraces deference to an agency's interpretation of its regulations (see *Robertson* v. *Methow Valley Citizens Council*, 109 S. Ct. at 1850); and that *Skidmore* may sometimes be helpful in assessing the reasonableness of such agency interpretations. To be sure, evaluation of the reasonableness of an agency interpretation—and the degree of deference to which it is entitled—may require consideration of the nature and form of that interpretation, but that fact lends no support to the Commission's theory.

Furthermore, even accepting the Commission's sharp dichotomy between *Chevron* deference and a lesser type of *Skidmore* deference, the Commission's corollary—that its adjudicatory interpretations *are* entitled to the higher *Chevron* deference—would not follow. *Chevron* explicitly

[4] See, *e.g.*, *Lukhard* v. *Reed*, 481 U.S. 368, 376 n.3, 378 (1987) (*Chevron* deference to Secretary's interpretation as reflected in Federal Register statement, letters, memoranda, and administrative practice); *id.* at 383-384 (Blackmun, J., concurring in judgment); *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 227-228, 233, 240-241 (1986) (*Chevron* deference to Secretary's interpretation in executive agreement); *Young* v. *Community Nutrition Inst.*, 476 U.S. 974, 977-982 (1986) (*Chevron* deference to FDA interpretation, including notice in Federal Register reflecting that interpretation); *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986) (*Chevron* deference to the FDIC's "practice and belief"; Court explicitly notes that "the FDIC's interpretation of the relevant statute has not been reduced to a specific regulation"); *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714-715 (1985) (*Chevron* deference to "a statement accompanying the regulations").

rests on the congressional delegation of policymaking authority to the agency (467 U.S. at 843-845), and, as will be discussed in greater detail, the Commission has not been given policymaking authority under the Act. Indeed, the commentary relied on so extensively by the Commission (Amicus Br. 12-14) itself emphasizes that "[a] purely adjudicative agency, holding no rulemaking or other policymaking powers, 'is not entitled to any special deference from the courts' for its interpretations," and cites with approval a Fifth Circuit decision holding that deference should be accorded to the Secretary, rather than the Commission, in this very OSH Act context. See Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1, 47 & n.217 (1990).[5]

2. Respondent and the Commission propose an irrational, bifurcated approach to evaluating the Secretary's interpretation of her regulation. Because their positions differ in some significant respects, they will be addressed separately.

a. Embracing the court of appeals' opinion, respondent contends that "'[t]he Secretary's unique policy and rulemaking role requires that her regulatory interpretations be accorded substantial weight by the Commission and contravened only if clearly wrong or in the presence of genuine ambiguity.'" Br. 16 (quoting Pet. App. 9a). We agree that the Secretary's interpretation may be rejected if her interpretation is "clearly wrong." But in advocating deference to the Commission whenever a regulation is determined to possess "genuine ambiguity," respondent precludes deference to the Secretary in the only situation in which it is pertinent.[6] As a result, respondent's state-

[5] Notably, neither the Commission, the respondent, nor any of the respondent's other amici addresses the fact that the Administrative Conference of the United States has analyzed the OSH Act context and has concluded that, in such "split-enforcement" administrative situations, the legislation should provide deference to the rulemaker, rather than the adjudicator. See Gov't Br. 36 n.36; 1 C.F.R. 305.86-4.

[6] See, *e.g.*, *INS* v. *Stanisic*, 395 U.S. 62, 72 (1969) ("Granting that the regulation and its successor provision are not free from

ment that the Secretary's interpretation must be accorded "substantial weight" is so lacking in content as to be meaningless.

b. The Commission's position is different. It acknowledges that "the Commission should be, and is, hesitant to substitute its reading of a regulation for the reading of the Secretary"; thus, "the Commission will reject the Secretary's view only when," pursuant to *Skidmore* and to *Gardebring* v. *Jenkins*, 485 U.S. 415, 420 (1988), "it lacks the power to persuade." Amicus Br. 18.[7] For the reviewing court, however, the question will not be the reasonableness of the Secretary's interpretation; rather, the question will be simply whether the court should sustain the Commission's conclusion without itself applying principles of deference to the Secretary's interpretation.[8]

Thus, under the Commission's approach, the Commission would defer to the Secretary's reasonable interpreta-

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ambiguity, we find it dispositive that the agency responsible for promulgating and administering the regulation has interpreted it" in a particular manner.); *Udall* v. *Tallman*, 380 U.S. at 4 ("The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it."); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. at 414 ("[A] court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt.").

[7] In *Gardebring*, this Court emphasized that "when it is the Secretary's regulation that we are construing, and when there is no claim in this Court that the regulation violates any constitutional or statutory mandate, we are properly hesitant to substitute an alternative reading for the Secretary's unless that alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." 485 U.S. at 430.

[8] See Comm'n Br. 18 n.7 ("The question for the court below was not whether to substitute its view for that of the Secretary; that was the question which the Commission faced. The question for the court below was whether to substitute its judgment for that of the only legally binding agency position in the case—*i.e.*, the Commission's order.").

tions, and, indeed, apply accepted principles of judicial review for that evaluation. On judicial review itself, however, a court would not apply those same principles to the Secretary's interpretation (as the Commission purportedly had). Rather, the reviewing court would defer to the Commission, which, in turn, had avowedly deferred to the Secretary.

This approach is ill-conceived. It sets forth a confusing, two-tiered structure. It converts the principle of deference (at least as embodied in *Skidmore* and *Gardebring*) into a doctrine limited to inter-agency review rather than an explication of factors to guide *all* review of an agency's interpretations of its regulations. And, in contending that the *reviewing court* should not defer to the Secretary's interpretation even though *the Commission* will, the Commission asserts a self-perceived duty of deference that is essentially unreviewable by the courts.

Rather than the artificial, bifurcated approach advocated by the Commission, it is far more appropriate—and consistent with established principles of judicial review—for the reviewing court to determine the reasonableness of the Secretary's interpretation. To the extent that the Commission's analysis of the Secretary's interpretation sheds light on that inquiry (as one would expect from a sophisticated adjudicatory tribunal whose members have background in the field and whose findings of fact are conclusive if supported by substantial evidence), it should of course be carefully considered by the court; the ultimate question, however, should be the reasonableness of the Secretary's interpretation. In view of the Commission's own view of its role, this approach cannot credibly be claimed to be intrusive or disrespectful of the Commission, or to complicate or handicap its proceedings. And such an approach represents a correct application of the Administrative Procedure Act because a Commission decision rejecting the Secretary's reasonable interpretation is not "in accordance with law." 5 U.S.C. 706(2)(A).[9]

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[9] See Gov't Br. 24 n.22. Indeed, the Commission agrees that, if it rejects the Secretary's reasonable interpretation of the statute

3. Respondent and its amici contend that granting deference to the Secretary's interpretations of her regulations will undermine the Commission's statutory role. Resp. Br. 12-15; Comm'n Br. 21-24. This objection is unfounded. The Commission's statutory role is to "carry[] out adjudicatory functions." 29 U.S.C. 651(b)(3). According deference to the Secretary's reasonable interpretations of ambiguous regulations is in no way inconsistent with that important adjudicatory function; indeed, the Commission claims to accord deference to the Secretary as part of its own conception of its adjudicatory role. Amicus Br. 18.

Respondent's amici nevertheless invoke the example of such agencies as the National Labor Relations Board and the Federal Trade Commission, both of which may announce new policy through adjudication, and claim that the Commission is similarly a policymaking body. See Comm'n Br. 21-22; Chamber of Commerce Br. 20-21. The example of these agencies, however, points in precisely the opposite direction. Such agencies have authority to announce new policies *either* in rulemaking or adjudication, and the exercise of that choice lies in the agencies' informed discretion.[10] That model, however, is inapposite here. In the OSH Act, Congress explicitly denied the Commission the power to make policy through the setting of standards and the administrative enforcement of the Act; to the contrary, as we noted, Congress gave those policymaking responsibilities to the Secretary

as embodied in a regulation, the Commission's decision is not "'in accordance with law'" (Amicus Br. 17 n.6); a similar principle should apply to the Secretary's interpretation of her regulations.

[10] See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[T]he Board is not precluded from announcing new principles in an adjudicative proceeding and * * * the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.").

and established the Commission solely as a "neutral arbiter." *Cuyahoga Valley Ry.*, 474 U.S. at 7. Unlike such entities as the National Labor Relations Board, the Commission has been vested with neither policymaking nor rulemaking authority by the pertinent statute;[11] the claim that its adjudicatory function gives it a policymaking role—rather than simply the role of a "neutral arbiter"—is baseless.

Refusing to defer to the Secretary's reasonable interpretations of her regulations would jeopardize the exercise of her statutory responsibilities. As explained in our opening brief (at 18-20), interpretive discretion to resolve ambiguities in a statute or regulation is an essential aspect of the policymaking responsibility delegated by Congress to an administrative agency. See *Department of Treasury* v. *FLRA*, 110 S. Ct. 1623, 1629 (1990); *Chevron*, 467 U.S. at 844; *INS* v. *Stanisic*, 395 U.S. at 72. The established principle that "an agency's construction of its own regulations is entitled to substantial deference" (*Lyng* v. *Payne*, 476 U.S. at 939) rests, at least in part, on a recognition that it would place an intolerable burden on a policymaking agency to allow it to clarify the meaning of a regulation only by promulgating a new or amended regulation. To the extent that an agency's interpretation is reasonable, it is within the scope of permissible interpretive discretion. This framework reflects not an encouragement of ambiguous regulations but a recognition that, when inevitable ambiguities arise, the promulgating entity is the most appropriate entity for resolving those ambiguities; denying the Secretary interpretive discretion accorded all other promulgating entities would severely hamper the discharge of her statutory mission.[12]

[11] Cf. 29 U.S.C. 156 (NLRB's rulemaking authority); 29 U.S.C. 160 (NLRB's authority to prevent unfair labor practices). See also 15 U.S.C. 45(a) (FTC's authority to prevent unfair methods of competition and unfair or deceptive actions or practices); 15 U.S.C. 46(g) (FTC's rulemaking authority).

[12] As an alternative argument, respondent suggests that, in lieu of a principle of deference, a reviewing court should simply "arrive

4. Respondent and its amici contend that the legislative history of the OSH Act supports deference to the Commission. Resp. Br. 15-17; Comm'n Br. 19-21; Chamber of Commerce Br. 13-19. They advance two basic points: (1) deference to the Secretary's reasonable interpretations of her regulations would undermine the express purpose of creating the Commission, and (2) the legislative debates contain references to the Federal Trade Commission and the National Labor Relations Board, and since both agencies may make policy in adjudications, the Commission should similarly be given such power. Neither objection is well founded.

The express purpose of creating the Commission was to ensure fairness and due process. *Legislative History* 195, 392-393, 1147.[12] That purpose would, of course, be fully served by a regime in which courts adjudicated challenges and accorded deference to the Secretary's reasonable interpretations. It is thus implausible to suggest that an independent adjudicatory board is somehow unable to act fairly under such a decisional principle. Indeed, as noted, the Commission understands its relationship to the Secretary to require deference to her interpretations (Br. 18), and there is no reason why the statutory purpose would be endangered by a court's application of the same standard.

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at the most reasonable interpretation" of a regulation. Br. 32. It is unclear whether respondent means that the court should reach that determination on its own (*id.* at 31), or should defer to the most reasonable of the competing interpretations by the Secretary and the Commission (*id.* at 11). Either alternative trenches on the policymaking responsibility assigned to the Secretary and exercised by other promulgating entities, regardless of whether they also possess adjudicative authority. See *Gardebring* v. *Jenkins*, 485 U.S. at 430; *INS* v. *Stanisic*, 395 U.S. at 72; *Udall* v. *Tallman*, 380 U.S. at 4.

[12] Staff of the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* (Comm. Print 1971) [hereinafter *Legislative History*].

The references to the Federal Trade Commission and the National Labor Relations Board in the legislative history lend no support to the proposition advanced by respondent and its amici. Senator Javits referred to the Federal Trade Commission twice—first, in stating that the Occupational Safety and Health Review Commission would have "the same type of authority that the Federal Trade Commission exercises: The power to issue a cease and desist order which, if challenged within a given period of time, can be reviewed by the Circuit Court of Appeals" (*Legislative History*, 462)[14] and second, in responding to a question concerning the "makeup" of the Commission by referring to the composition and authority of the FTC (*id.* at 465, 471). These references obviously do not support the proposition that the Commission was intended to enjoy policymaking power parallel to the FTC's.[15]

As for the NLRB, Senator Javits also referred to it twice—first to state simply that its record and that of similar independent agencies "in the area of quasi-judicial adjudication" was neither so bad nor so good as to justify the reactions to the proposal for an independent adjudicative agency in the OSH Act (*id.* at 194) and, second, to state that, in the NLRB and the Equal Employment Opportunity Commission, "independent counsel"

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[14] Both the Commission and the Chamber of Commerce, in quoting this statement, include only the phrase "'the same type of authority that the Federal Trade Commission exercises,'" without the immediately succeeding explanation of the authority referred to. See Comm'n Br. 20; Chamber of Commerce Br. 18. Cf. Gov't Br. 31 n.28.

[15] Indeed, in *opposing* the Javits amendment and in supporting the assignment of adjudication to the Secretary, Senator Williams invoked the FTC as a positive example of an entity that combined policymaking and adjudication (*id.* at 467; see also *id.* at 427); conversely, in *supporting* the Javits amendment, Senator Dominick cited the FTC's combination of functions as the kind of procedure that he hoped to avoid through the creation of the Commission (*id.* at 472).

had been provided (*id.* at 477). Again, neither of these statements suggests that the Occupational Safety and Health Review Commission was intended to have a policymaking role akin to the NLRB's—a contention that would, in any case, be refuted by the stark differences between the statutory assignment of policymaking authority to the NLRB and the lack of any such assignment to the Commission. See note 11, *supra*.

Moreover, respondent and its amici disregard the critical fact that Congress explicitly rejected proposals to strip policymaking authority from the Secretary; the reasons given for this congressional decision were the Secretary's expertise in formulating policy and the legislative goal of promoting close coordination between policymaking and enforcement—two of the reasons this Court has stressed as the basis for deference. See Gov't Br. 29-31.

5. Respondent's amici also dispute our contention that principles developed in other contexts support the conclusion that the Secretary, rather than the Commission, is entitled to deference. See Comm'n Br. 27-28; Chamber of Commerce Br. 24-27.

In our brief, we noted (at 33-34) that as to the Longshore and Harbor Workers' Compensation Act, this Court has explained that the interpretations of the Benefits Review Board are not entitled to deference because the Board "is not a policymaking agency." *Potomac Elec. Power Co. (Pepco)* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980). Respondent's amici offer three responses: (1) the courts of appeals have been in conflict about whether to follow *Pepco*; (2) the Longshore Act context and the OSH Act context are distinguishable; and (3) the Court's statement in *Pepco* can be dismissed as dictum.

The first objection is patently erroneous. *Every* court of appeals that has considered the matter since *Pepco* has concluded that the Benefits Review Board, as a purely adjudicatory entity, is not entitled to deference. See

Gov't Br. 34-35 n.33 (collecting cases).[18] The second objection is also insubstantial. The Longshore Act context and the OSH Act context are not distinguishable on the pertinent point—that, like the Benefits Review Board, the Commission is not a policymaking agency. Finally, although this Court's observation concerning the Benefits Review Board may not have been strictly necessary to the holding in *Pepco*, the statement represents a considered conclusion regarding the role of the Board, and the Court's observation relies on two leading court of appeals decisions, which had similarly held that the Board's interpretations were not entitled to deference because the Board was not a policymaking entity. See 449 U.S. at 278 n.18. This Court's statement in *Pepco* is thus entitled to more than the curt dismissal suggested by respondent's amici, and, as noted, the courts of appeals have unanimously understood *Pepco* to mean that the Board's interpretations are not entitled to deference.

In our brief, we also noted that, in the similar administrative structure created by the Federal Mine Safety and Health Act of 1977, the Secretary of Labor's interpretations, rather than the Federal Mine Safety and Health Review Commission's interpretations, have received deference when their interpretations conflict. Br. 35-36. Although the amici claim that the Mine Safety and Health context is distinguishable (Comm'n Br. 27-28; Chamber of Commerce Br. 25-26), they are unable to identify any material difference between the two administrative structures that would justify different principles of deference. The amici also claim that the court of appeals decisions have been conflicting (Comm'n Br.

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[18] As we pointed out (Br. 34-35 n.33), most courts of appeals have also held that, as a logical corollary, the interpretations of the policymaking entity (the Director of the Office of Workers' Compensation Programs) are entitled to deference; as we also pointed out (*ibid.*), however, two courts of appeals have suggested that, at least in some circumstances, neither the Board nor the Director is entitled to deference. Cf. note 12, *supra*.

28; Chamber of Commerce Br. 25-26), but the suggestion is simply inaccurate. For instance, the Chamber of Commerce (at 26) cites *Brock* v. *Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987), but fails to mention that the decision explicitly reiterates the principle of "*Chevron* deference to the Secretary's, not the Commission's, interpretation of the Act." *Id.* at 1146 n.41. For its part, the Commission claims (at 28) that "courts have disagreed about the appropriate deference" in the Mine Act context; in fact, the decisions addressing the issue make it clear that, in cases of conflict between the Secretary and the Commission, the Secretary should receive deference. See Gov't Br. 35-36.[17]

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[17] The Commission also claims that examples concerning the Board of Immigration Appeals (BIA) and the Merit Systems Protection Board (MSPB) support its position. Amicus Br. 22 n.9. This claim is incorrect. With regard to the BIA, the statute vests administrative authority in the Attorney General (8 U.S.C. 1103(a)); the Attorney General, in turn, has delegated authority to the Commissioner of the Immigration and Naturalization Service (8 C.F.R. 2.1) and to the Board of Immigration Appeals, under the supervision of the Executive Office for Immigration Review (8 C.F.R. 3.0-3.2). The Attorney General retains authority to review BIA decisions (8 C.F.R. 3.1(h)). Thus the BIA is simply a delegate of the Attorney General for the statutory authority conferred *on him*; to the extent that the BIA's views would conflict with the Attorney General's views, the former would not be entitled to deference. In *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), and the other decisions cited by the Commission, the claim for deference arose in a context in which the BIA, INS, and the Attorney General were in agreement.

As for the MSPB, unlike the Commission, it is given limited substantive rulemaking authority, and it was to the MSPB's interpretation of an MSPB-promulgated regulation that the Court deferred in *Cornelius* v. *Nutt*, 472 U.S. 648, 657-659 (1985), a case in which the Office of Personnel Management (OPM) agreed with the MSPB. Furthermore, the Federal Circuit, which now has exclusive jurisdiction of most MSPB appeals (5 U.S.C. 7703(b)(1)), has explicitly accorded deference to the OPM, rather than the MSPB, in a case in which the MSPB and the OPM disagreed. See *Horner* v. *Andrzjewski*, 811 F.2d 571, 574-576 (Fed. Cir. 1987). In contrast, *United States* v. *Paddack*, 825 F.2d 504, 513 (D.C. Cir. 1987), relied on by the Commission, was a case in which the court found no "legally relevant interpretation" by the agency that had drafted the regulation in dispute and thus no conflict with the interpretation of the adjudicating agency.

Amicus American Iron and Steel Institute (AISI), in turn, claims that the Tax Court, rather than the IRS, receives deference from the appellate courts. Br. 10-11. Several lower court decisions have refused to give deference to the Tax Court. See, *e.g.*, *Commissioner* v. *Hendrickson*, 873 F.2d 1018, 1022 (7th Cir. 1989); *Lynch* v. *Commissioner*, 801 F.2d 1176, 1178-1179 (9th Cir. 1986); *Vukasovich, Inc.* v. *Commissioner*, 790 F.2d 1409, 1413 (9th Cir. 1986). And in our view, the tax statute itself precludes special deference to the Tax Court in the event of conflicting interpretations between the Tax Court and the Commissioner. See 26 U.S.C. 7482(a)(1) (providing for appellate review of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury"). See also *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 476-477 (1979).

6. Respondent also maintains that the Secretary's interpretation is unreasonable on a number of grounds and that, even though the court of appeals did not resolve the reasonableness of the Secretary's interpretation, this Court should decide the question in the first instance. Br. 23-29. As discussed in our opening brief (at 37 n.37), we believe that, since the court of appeals has not addressed this matter, a remand to that court is appropriate. But if the issue is to be considered here, respondent's contentions should be rejected and the Secretary's interpretation sustained.

The coke oven emission standard incorporates the general respiratory standard. See 29 C.F.R. 1910.1029(g)(3) (incorporating 29 C.F.R. 1910.134), quoted at Pet. App. 122a. The incorporated standard states, in part, that "[t]raining shall provide the men an opportunity to handle the respirator, have it fitted properly, * * * and, finally, to wear it in a test atmosphere." 29 C.F.R. 1910.134(e)(5), quoted at Pet. App. 115a. Under the Secretary's interpretation, this provision does not simply require an employer to place an employee in a test atmos-

phere wearing a respirator and then leave the employer free to ignore the test results; rather, it also requires that, if the test indicates an improper fit, the employer must provide the employee with a respirator that fits. Contrary to respondent's suggestion, the language of the regulation, referring both to a respirator's being "fitted properly" and worn "in a test atmosphere," supports this interpretation. Indeed, any other interpretation would strip the regulation of its force.

Respondent nevertheless maintains that the Secretary's interpretation of Section 134 is unreasonable. Respondent emphasizes that another provision of the coke oven standard (29 C.F.R. 1910.1029(g)(4)(i), quoted at Pet. App. 122a) requires an employer to ensure that "the respirator is fitted properly," and urges that the Secretary's interpretation of Section 134 be rejected because of this specific fit requirement. Resp. Br. 27-28. This contention misapprehends the role of Section 134 in the administration of the OSH Act. Section 134 is relevant in three different types of situations: (1) when it applies directly; (2) when it applies through incorporation in a particular standard and the incorporating standard has no specific fit requirement (as in the standard for vinyl chloride, 29 C.F.R. 1910.1017(g)(3)); and (3) when it applies through incorporation in a particular standard and the incorporating standard has a specific fit requirement (as in the standard for asbestos, 29 C.F.R. 1910.1001(g)(3) and (4), and App. C). In most of the regulations involving the third situation, the specific fit requirement includes a general statement that the employer must ensure that the respirator is "fitted properly" and then imposes highly specific additional requirements (*e.g.*, the asbestos standard, *supra*). In the first two categories, the rejection of the Secretary's interpretation of Section 134 would prevent the Secretary from imposing a fit testing requirement even though, in these situations, an alternative specific fit requirement—the professed basis for rejecting the Secretary's interpretation—does not exist.[18]

Respondent also errs in suggesting (at 27 n.24) that the citation issued in this case represents merely a compliance officer's mistake. Section 1029(g)(4)(i) now consists of only a single sentence containing a general fit requirement. See Pet. App. 122a. Initially, however, consistent with many other standards that incorporate Section 134 and impose additional specific requirements (the third category outlined above), Section 1029(g)(4)(i) also contained a specific additional requirement—quantitative fit testing—and the sentence now remaining in Section 1029(g)(4)(i) served in large part as an introduction to that specific requirement. See 41 Fed. Reg. 46,787 (1976). After the quantitative fit requirement was invalidated in litigation, only the initial sentence remained. See *American Iron & Steel Inst.* v. *OSHA*, 577 F.2d 825, 839 (3d Cir. 1978), cert. dismissed, 448 U.S. 917 (1980). Although the compliance officer may have been mistaken in believing that the first sentence of Section 1029(g)(4)(i) had also been invalidated (cf. Pet. App. 43a), he was not at all incorrect in concluding that, with the invalidation of the quantitative fit requirement in Section 1029(g)(4)(i), the general fit testing requirement imposed by Section 134 and incorporated in Section 1029(g)(3) remained pertinent.

Finally, respondent's related suggestion (at 24-25; see also Comm'n Br. 18) that the Secretary's interpretation is merely a litigation position for this case is also incorrect. As an initial matter, respondent cannot claim unfair surprise because, as the Commission observed, OSHA's compliance officer had explicitly warned respondent that its employees' respirators should be "fitted in banana oil or irritant smoke" and respondent's training film in-

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[18] The Secretary currently interprets Section 134 to impose this respirator fit testing requirement. See OSHA Instruction CPL 2-2.29, *reprinted in* 1 O.S.H. Rep. (BNA) 21:8321 (1986).

structed its employees that "if an employee detected the presence of banana oil, a new respirator would be supplied." Pet. App. 38a; see also Pet. App. 81a.[19] In any event, respondent's suggestion is incorrect: Both before and after the citation at issue here, the Secretary has cited employers for violations of Section 134 on the ground that the employer did not ensure proper respirator fit.[20] And as noted above, that interpretation is currently embodied in OSHA's official program instructions. See note 18, *supra*.[21] The interpretation represents an im-

[19] The Commission (Br. 26-27) vehemently objects to this and related observations in our opening brief (at 27, 37), but does not dispute the underlying facts. We highlighted those facts and the consequences of the court of appeals' decision to emphasize the instability and irrationality created by a regime in which the regulatory interpretation by the policymaking and administering entity may be rejected without a judicial determination that the interpretation is unreasonable.

[20] *E.g.*, OSHA Inspection H9371-055 (Mar. 19, 1979); OSHA Inspection F5129-060 (Nov. 20, 1979); OSHA Inspection 102806866 (May 22, 1989); OSHA Inspection 100566306 (Feb. 15, 1990); OSHA Inspection 017799891 (June 14, 1990).

[21] Even without regard to the prior and subsequent agency actions relying on this interpretation, the fact that the interpretation was the very basis for the administrative action (the citation) serves to distinguish it from a situation in which the interpretation at issue is simply a post hoc rationalization by appellate counsel. Cf. *Bowen* v. *Georgetown University Hosp.*, 488 U.S. 204, 212 (1988).

Amici also contend that the Secretary's interpretation has been inconsistent (Comm'r Br. 18; Chamber of Commerce Br. 22 n.8; see also Pet. App. 44a n.14). The claimed inconsistency, however, relates to testing method, not to whether Section 134 imposes a fit testing requirement at all; as respondent acknowledges (Br. 24 n.21), the question whether a test atmosphere was the required method is not at issue. Like the current program instruction, the previous administrative document interpreted Section 134 as requiring that "[t]he respiratory protective equipment must be properly fitted." Industrial Hygiene Field Operations Manual, ch. XII, Sec. A, para. 4(d) (Jan. 1, 1979), *reprinted* in Empl. Safety & Health Guide (CCH) ¶ 4488.10 (1979).

portant aspect of OSHA's compliance program, and its rejection would have significant consequences for OSHA's respiratory enforcement efforts.[22]

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

OCTOBER 1990

[22] Respondent also emphasizes (at 27-28) that Section 134 was a "national consensus standard" adopted under the expedited procedure of 29 U.S.C. 655(a). As discussed in our opening brief (at 25 n.23), the adoption of a national consensus standard as a regulation of the Secretary is itself a policymaking exercise, and the Secretary's interpretations of such a standard are accordingly entitled to deference. And even if the Secretary's role in adopting, rather than writing, the standard bears on the appropriate degree of deference, it does not affect the reasons for deference as a basic principle of review (the Secretary's role in setting policy and enforcing the standard on a day-to-day basis), and it certainly does not justify according deference to the Commission, which has neither written nor adopted the standard, nor administered it on an ongoing basis.

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